

No. 75-1544

Supreme Court, U. S.

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In the Supreme Court of the United States

OCTOBER TERM, 1975

RONALD LEE HARPER, PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
NINTH CIRCUIT**

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that cocaine is arbitrarily and irrationally classified as a narcotic drug under the Comprehensive Drug Abuse Prevention and Control Act of 1970.

After a jury-waived trial upon stipulated facts in the United States District Court for the Southern District of California, petitioner was convicted of one count of possessing cocaine with intent to distribute it and one count of distributing and dispensing cocaine, in violation of 21 U.S.C. 841(a)(1). He was sentenced to treatment and supervision under the Youth Corrections Act, 18 U.S.C. 5010(b). The court of appeals affirmed (Pet. App. A).

The stipulated facts (Pet. 6-11) show that in December 1974, petitioner sold an undercover agent of the Drug Enforcement Administration approximately 2.5 grams of

cocaine and made arrangements to sell her an additional pound of that drug. The second transaction was not consummated, however, because at the time of the proposed sale, petitioner learned that the police were present in the area and refused to proceed, although he expressed continued interest in completing the planned exchange at a later date.

Petitioner contends (Pet. 13) that the classification of cocaine as a narcotic drug (a Schedule II controlled substance) under 21 U.S.C. 812(c) is arbitrary and without basis in fact, and that as a result of such erroneous classification, he was improperly subjected to a harsher maximum penalty than persons convicted of offenses involving non-narcotic drugs, in violation of the Due Process and Equal Protection Clauses of the Fifth Amendment.¹

As petitioner recognizes (Pet. 21), all the courts that have considered a similar challenge to the classification of cocaine as a narcotic drug have rejected it. *United States v. Smaldone*, 484 F. 2d 311, 319-320 (C.A. 10), certiorari denied, 415 U.S. 915; *United States v. Brookins*, 383 F. Supp. 1212 (D. N.J.); *United States v. Hobbs*, 392 F. Supp. 444 (D. Mass.); *United States v. Castro*, 401 F. Supp. 120 (N.D. Ill.); *United States v. Umentum*, 401 F. Supp. 746 (E.D. Wis.).

¹The Court need not reach this latter argument, if, as the court of appeals did, it rejects petitioner's contention that the classification of the drug is arbitrary and irrational. In any event, petitioner was not prejudiced by the disparate maximum penalties for possession of narcotic and non-narcotic controlled substances, for he was sentenced to treatment under the Youth Corrections Act. Thus, this case presents no occasion to review that question.

The constitutionality of the legislative classification of cocaine as a narcotic drug depends upon whether that classification rests upon "some rational basis within the knowledge and experience of the legislators." *United States v. Carolene Products Co.*, 304 U.S. 144, 152. Congress had a rational basis for concluding that cocaine has a high potential for abuse and that its misuse might lead to severe psychological or physical dependence, as indicated in 21 U.S.C. 812(b)(2)(A) and (C). See *Marshall v. United States*, 414 U.S. 417, 427-428. As the lower courts have recognized, although the pathological effects of cocaine usage are a subject of continuing medical debate, the drug's potential for societal harm is generally accepted (Pet. App. A 2). Under these circumstances, the legislative classification of cocaine as a narcotic drug is valid. See *McGinnis v. Royster*, 410 U.S. 263, 276.²

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JUNE 1976.

²Petitioner's reliance (Pet. 13-14) on *United States v. Castro, supra*, is misplaced. As the court of appeals noted (Pet. App. A 2), although the court in that case was sympathetic to the argument that cocaine may not be a narcotic in the strict pharmacological sense, it nonetheless concluded that there was a rational basis for its classification as a narcotic drug for regulatory purposes.